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Paper No. 4

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OFFICE OF PETITIONS

In re Application of
Cartier et al.
Application No. 10/053,495
Filed: November 2, 2001
Attorney Docket No. 005127.00090

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: **DECISION ON PETITION**
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This is a decision on the petition under 37 CFR 1.53(e), filed May 20, 2002, to accord the above-identified application a filing date of November 2, 2001, with an indication that page 15 of the specification and one sheet of drawings containing Figures 7a through 7d were present on filing.

The petition is dismissed. This is not a final agency action. Any request for reconsideration as indicated below must be filed within TWO MONTHS of this mailing. See 37 CFR 1.181(f). Extensions of time are not permitted under 37 CFR 1.136(a) or (b).

The application papers for the above-captioned application were deposited with the USPS by way of the Express Mail procedure of 37 CFR 1.10 on November 2, 2001. However, on March 22, 2002, the Office of Initial Patent Examination(OIPE) sent a Notice of Missing Parts, which is immaterial to the issues addressed herein, which however, also contained a notification of missing items. That is, the Notice indicated that page 15 of the specification and Figures 7a through 7d described in the specification were missing.

In reply, on May 20, 2002, applicant filed the instant petition and fee, and a copy of the instant application papers asserted to have been made from the correspondence deposited with the USPS on November 2, 2001. Petitioner asserts that since counsel's record copy contains the aforementioned missing items, it follows that these same items were enclosed in the Express Mail envelope, and thus in fact were received by the USPTO. As such, petitioner urges the evidence establishes that a filing date of November 2, 2001, is warranted, as well as an indication that the USPTO received the missing page 15 and drawing Figures 7a through 7d on the date in question.

The instant file is the official USPTO record of the papers that have been received. The missing page 15 of the specification and drawing Figures 7a through 7d asserted to have been entrusted to the USPS on November 2, 2001, are not in the file and cannot be located. While counsel's record copy of the instant application papers has been considered, counsel's record copy is not persuasive that the missing items were received at the USPTO on November 2, 2001. Counsel's record copy was clearly made prior to the

insertion of the correspondence in the Express Mail envelope. Therefore, counsel's record copy is not more probative of the issue that the contents of the instant file.

Further, as noted in MPEP 513, the receipt of some of the correspondence (e.g., pages 1 through 14 of the specification, and all the other drawings figures) for this application from the package for Express Mail Label No. EL 68633580US cannot be employed to "bootstrap" a contention that the missing page 15 of the specification and the missing drawing Figures 7a through 7d must have likewise been received at the USPTO.

Rather, a party urging that papers were originally received at the USPTO, and subsequently misplaced has the burden of showing, by a preponderance of the evidence, that the missing papers were in fact received at the USPTO. As explained in MPEP 503, an appropriately itemized postcard receipt, showing a USPTO date stamp, will serve as *prima facie* evidence of receipt of items asserted to have been misplaced after receipt at the USPTO. If petitioner has such an appropriately itemized postcard receipt, such should be included with any renewed petition.

Therefore, petitioner has not met his burden of establishing that the missing page of specification and sheet of drawings were received at the USPTO on November 2, 2001. Accordingly, the requested relief cannot be granted, as based upon the current record, this application is not entitled to a filing date of November 2, 2001, with page 15 and Figures 7a through 7d that were filed May 20, 2002.

While this application is entitled to a filing date of November 2, 2001, it is not entitled to that filing date with an indication that 15 pages of specification and a sheet of drawing containing Figures 7a through 7d were present on filing.

A proper reply to a Notice of Omitted Items requires: (1) a showing that the omitted items were in fact received at the USPTO, which for the reasons given above, has not been shown, or (2) a prompt submission of the missing drawing figures, along with a supplemental declaration executing the amended application and specifically referencing the later filed drawing Figures and page of specification filed May 20, 2002, with a resulting acceptance by applicant of the USPTO date of receipt of the drawings and additional page of specification as the filing date, or (3) if applicant is willing to accept the application as filed on November 2, 2001, which lacked Figures 7a through 7d, then applicant must supply an amendment which cancels all reference(s) to the omitted drawings, both in the brief and detailed descriptions of the drawings, as well as any reference to the numerals shown only in the missing drawings.

Accordingly: should applicant desire to retain the filing date of November 2, 2001, then applicant need only submit a renewed petition to that effect, and also file as a separate paper with the petition an amendment which cancels all references in the specification to the omitted drawing Figures 7a through 7d, the drawing figures, and their numerals

mentioned in the specification. It should be noted that such action would not preclude applicant from later seeking to reintroduce some or all of the drawings, subject, however, to the examiner's possible determination that would constitute the addition of new matter. But see 35 USC 132.

Alternately, if applicant willing to accept a filing date of May 20, 2002, the date that the record shows that the missing drawing Figures 7a through 7d and page 15 of the specification were first received at the USPTO, then he must also indicate such, and file with the renewed petition an oath or declaration in compliance with 37 CFR 1.63 and 1.64 executing by specifically mentioning both the specification as amended by the addition of page 15, and drawing Figures 7a through 7d filed May 20, 2002. See 37 CFR 1.63(b)(1).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Assistant Commissioner for Patents
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Telephone inquiries concerning this decision may be directed to the undersigned at 305-1820.



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